

Claimant filed his Application for Preliminary Hearing (Form E-3) alleging an underpayment of weekly temporary total disability benefits. Specifically, the claimant alleges that his average weekly wage should have included his wages earned not only with the respondent but also with Heyco-Oswalt Company. The Administrative Law Judge, in his Preliminary Hearing Order of June 22, 1994, denied the claimant's request, finding that

the claimant did not suffer an accidental injury arising out of and in the course of his employment with Heyco-Oswalt Company. From this Preliminary Hearing Order, the claimant appeals raising the sole issue as to whether the Administrative Law Judge erred in not finding that, since claimant was engaged in two part-time employments, his average gross weekly wage should be calculated based on both.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

During oral argument of this appeal, the claimant was first requested to address the jurisdictional basis for the Appeals Board to entertain this appeal. The claimant argues that the appeal concerns the interpretation of K.S.A. 44-511(a)(7) which provides that the average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment in which such employee performs the same or very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. Claimant contends that since the Administrative Law Judge failed to calculate his average gross weekly wage based on his two part-time employments that this was a finding that the claimant's accidental injury did not arise out of and in the course of his multiple employment. Since this is one of the jurisdictional issues listed in K.S.A. 44-534a(a)(2), claimant alleges this Preliminary Hearing Order is subject to review.

The Appeals Board agrees that, if the issue of whether the claimant suffered an accidental injury arising out of and in the course of employment with the respondent is disputed, K.S.A. 44-534a(a)(2) grants the Appeals Board jurisdiction to review the preliminary hearing order. However, in the present case, the claimant's claim only involves an injury while he was working for Palmer Manufacturing and Tank Company, Inc., the respondent herein. What the claimant is requesting is for his average gross weekly wage to be calculated not only based on wages earned while working for the respondent but also on wages earned while working at the same time for Heyco-Oswalt Company. Accordingly, the real issue being framed is the correct amount of the claimant's average gross weekly wage for calculation of weekly temporary total disability benefits.

Respondent paid claimant 21.34 weeks of temporary total disability benefits at \$107.23 per week based on an average weekly wage of \$160.84 earned while working for the respondent. Claimant alleges that K.S.A. 44-511(a)(7) requires that his average gross weekly wage includes not only the part-time employment where he was injured but also is required to include wages from his other employment, Heyco-Oswalt Company. The Administrative Law Judge found in his Order that the Heyco-Oswalt Company wages should not be included.

The Appeals Board finds that K.S.A. 44-534a(a)(2) grants the Administrative Law Judge authority to make a preliminary hearing award in reference to temporary total disability compensation. Part of making an award of temporary total disability compensation is the determination of the claimant's average gross weekly wage. Therefore, since the Administrative Law Judge had the authority to determine the claimant's average weekly wage, he did not exceed his jurisdiction in doing so. See K.S.A. 44-551(b)(2)(A). The Appeals Board does not have jurisdiction to review this preliminary hearing order as the computation of the average weekly wage is not an issue that is

enumerated in K.S.A. 44-534a(a)(2) which grants the Appeals Board jurisdiction to review a preliminary hearing order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this appeal should be, and hereby is, dismissed, and the Order of Administrative Law Judge Thomas F. Richardson, dated August 26, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
P. Kelly Donley, Wichita, KS
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director